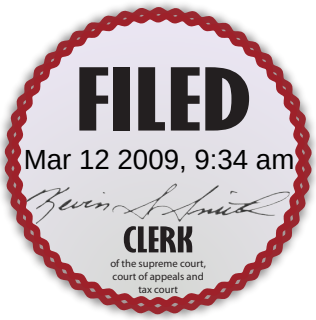

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IN THE
COURT OF APPEALS OF INDIANA

KATRINA L. SNOW and CHRISTINA M. WRIGHT,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 84A04-0806-CV-360
BR ASSOCIATES, INC. and SIDAL, INC.,	)	
Appellees-Defendants.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Michael J. Lewis, Judge
Cause No. 84D06-0711-CT-11883

March 12, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Christina M. Wright[1] appeals from the trial court's order setting aside default judgment and staying all further proceedings pending arbitration of Wright's claims against BR Associates, Inc. ("BR") and Sidal, Inc. ("Sidal") (collectively "Defendants"). Wright presents four issues for review, which we consolidate and restate as:

1. Whether the trial court's special findings and conclusions are adequate for appellate review.

2. Whether the trial court abused its discretion when it set aside the default judgment against Defendants.

3. Whether the trial court erred when it stayed the proceedings and ordered the parties to arbitrate Wright's claims.

We affirm.

FACTS AND PROCEDURAL HISTORY

According to the complaint,[2] Wright is a former assistant manager of a Denny's restaurant in Terre Haute. BR and/or Sidal[3] own restaurants in Indiana, Illinois, Kentucky, and Ohio, including the Denny's restaurant where Wright worked from April 25, 2003, to the Spring of 2006. On November 19, 2007, Wright and Katrina L. Snow ("Plaintiffs") filed their Collective Action and Class Action Complaint for damages and Injunctive Relief and Request for Trial by Jury ("Complaint"). In the Complaint, they

[1] While the appeal originally filed by Wright and Katrina L. Snow was pending, Snow filed a Joint Motion for Partial Dismissal. In that motion, Snow and Defendants agreed to the dismissal of all of Snow's claims with prejudice.

[2] Because the proceedings in this case have been stayed pending arbitration, there has been no trial to determine the facts. Thus, for purposes of our review, we assume the facts as alleged in Plaintiffs' complaint and Defendants' motion to set aside default judgment.

[3] The parties agree that Plaintiffs are former employees of BR, but Defendants dispute whether Plaintiffs were employed by Sidal.

allege in part that Defendants violated the Fair Labor Standards Act, 29 U.S.C. § 216(b) ("FLSA"), and Indiana wage statutes.

Defendants deny that Plaintiffs properly served the Complaint, but concede actual service. Therefore, on November 29, 2007, Defendants met with their former counsel, Michael W. Owen, to discuss the Complaint and two other legal proceedings. After the meeting, Owen calendared the due dates for answering the complaints filed in each of the actions. However, he transposed the due date for answering the Complaint in this case with the due date for answering the complaint in another case. As a result, he did not file an appearance or Defendants' answer to the Complaint within the 23-day deadline under Indiana Trial Rule 6(C) and (E).

On December 26, 2007, after the deadline for filing an answer had passed, Plaintiffs filed their motion for default judgment. On December 28, 2007, unaware that the deadline for answering had passed or that Plaintiffs had filed a motion for default judgment, Defendants, through Owen, filed their answer and Owen's appearance. On January 11, 2008, the trial court entered default judgment against Defendants. Despite Owen's appearance, the court served copies of the order on Defendants directly instead of through Owen. On January 16, 2008, Defendants advised Owen that they had received copies of the default judgment. Owen inquired at the court and for the first time learned that the answer he had filed was untimely.

On March 4, 2008, Defendants filed their motion to set aside the default judgment and motion for summary judgment. Plaintiffs requested that the court set Defendants' motion for hearing and later filed a brief objecting to the motion to set aside. The court

set Defendants' motion to set aside and all other pending motions for hearing on May 5.[4] On May 2, Plaintiffs filed a motion requesting the court to make specific findings of fact and conclusions of law at the close of evidence at the May 5 hearing on Defendants' motion to set aside the default judgment.

Before the start of the hearing on May 5, Defendants filed a motion for stay pending arbitration. The court then proceeded with the hearing on the motion to set aside the default judgment, and, at the close of evidence, took that matter under advisement. The trial court gave Plaintiffs until June 4, 2008, to file a response to the motion to stay pending arbitration. But on May 22, the court entered an order ("Order") granting Defendants' motion and staying all proceedings pending arbitration, as follows:

> This matter having come before this Court on the Motion of the Defendants to vacate default judgment and stay all further proceedings pending the outcome of arbitration, pursuant to the Federal Arbitration Act and the Indiana Arbitration Act, and the Court being advised, now FINDS THAT: (1) the Plaintiff[s,] BR Associates, Inc. and Sidal, Inc. are parties to a valid arbitration agreement covering the subject matter of this action; (2) excusable neglect exi[s]ts based upon the testimony of Attorney Owen regarding the mis-docketing of dates; and (3) . . . Defendants have made a prima facie case of meritorious defenses as set forth in the memorandum filed with this Court and the Court concludes as a matter of law that it is required by the Federal Arbitration Act[,] 9 U.S.C. §§ 2 [and] 3[,] and the Indiana Arbitration Act, [Indiana Code Section] 34-57-2-3, to enforce the part[ies'] arbitration agreement and stay all further proceedings pending arbitration, and that just cause exists for vacating the default judgment.
>
> IT IS HEREBY ORDERED that the Default Judgment entered by the Court and all discovery orders are hereby vacated and all further proceedings in this action are stayed pending the outcome of the part[ies'] arbitration, pursuant to their arbitration agreement.

Appellant's App. at 11-12. Wright now appeals.

[4] At the time the court set the May 5 hearing, there were pending several discovery and other motions not relative to the resolution of the issues on appeal.

DISCUSSION AND DECISION

Issue One: Adequacy of Special Findings[5]

Wright contends that the trial court failed to make adequate special findings in the Order on Defendants' motion to set aside the default judgment.[6] Special findings are adequate if they disclose a valid basis for the legal result reached by the trial court. Bauer v. Harris, 617 N.E.2d 923, 926-27 (Ind. Ct. App. 1993). Likewise, special findings are inadequate if they fail to disclose a valid basis for the conclusions and judgment. Id. When it makes special findings of fact, the trial court need not recite the evidence in detail, but must only make findings as to those ultimate facts necessary to support the judgment. Riehle v. Moore, 601 N.E.2d 365, 369 (Ind. Ct. App. 1992).

Indiana Trial Rules 55 and 60 govern the setting aside of a default judgment. Trial Rule 55(C) states that "[a] judgment by default which has been entered may be set aside by the court for the grounds and in accordance with the provisions of Rule 60(B)." Trial Rule 60(B) provides, in relevant part: "On motion and upon such terms as are just the

[5] Wright argues in part that the Order is inadequate because the trial court made no finding on whether Defendants had filed the motion to set aside the default judgment within a reasonable time. Such a finding is necessary to vacate a default judgment and, therefore, to permit review of all of the issues raised on appeal. See Ind. Trial Rule 60(B); Whitt v. Farmer's Mut. Relief Ass'n, 815 N.E.2d 537, 540-41 (Ind. Ct. App. 2004). Thus, in the interest of judicial economy and to permit review of Wright's claims, we remanded this case to the trial court for the limited purpose of issuing an amended order vacating the default judgment to include sufficient findings of fact. The trial court filed its Amended Findings of Fact, Conclusions of Law and Order Setting Aside Default Judgment and Staying Proceedings Pending Arbitration ("Amended Order") on December 30, 2008. The Amended Order is twenty-eight pages in length and contains detailed findings and conclusions thereon regarding many aspects of Plaintiffs' and Defendants' respective claims, not all of which are relevant to the issues on appeal. We consider the Amended Order only to the extent that its findings and conclusions address the deficiency in the original order, namely, the lack of a finding and any conclusions thereon regarding whether Defendants filed their motion to set aside the default judgment within a reasonable time.

[6] The Order contains the trial court's decision on the motion to set aside the default judgment and on Defendants' motion for stay and to compel arbitration. When Plaintiffs filed their request for special findings, only the motion to set aside was pending. Therefore, we limit our review to the adequacy of findings and conclusions thereon in regard to the order setting aside the default judgment.

court may relieve a party . . . from an entry of default, . . . including a judgment by default, for the following reasons: (1) mistake, surprise, or excusable neglect[.]" A motion to set aside a default judgment under Rule 60(B)(1) must be filed within one year but, at a minimum, within a reasonable time. Ind. Trial Rule 60(B)(1); Whitt v. Farmer's Mut. Relief Ass'n, 815 N.E.2d 537, 540-41 (Ind. Ct. App. 2004). We review the grant or denial of a Trial Rule 60(B) motion for relief from judgment under an abuse of discretion standard. Munster Cmty. Hosp. v. Bernacke, 874 N.E.2d 611, 613 (Ind. Ct. App. 2007). The trial court must balance the need for an efficient judicial system with the judicial preference for deciding disputes on the merits. Id. On appeal, we will not find an abuse of discretion unless the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or is contrary to law. Id.

Wright first contends that the Order "contains no finding describing what fact constitutes the 'excuse,' nor did the trial court make any conclusion of law describing the reason it deemed Attorney Owen's failure to timely file an Answer to Plaintiffs' Complaint to be 'excusable.'" Appellant's Brief at 13. In the motion to set aside, Defendants requested relief under Trial Rule 60(B)(1), alleging the existence of excusable neglect because Owen had confused the due date for answering the Complaint in this case with the answer due date in another case for Defendants. The court found that "excusable neglect exi[s]ts based upon the testimony of Attorney Owen regarding the mis-docketing of dates." Appellant's App. at 11. That finding sufficiently discloses a valid basis for the court's Order setting aside the default judgment, namely, the attorney's

accidental mis-docketing of the due dates for filing answers in two cases. The finding in the Order regarding excusable neglect is sufficient for appellate review.

Next Wright contends that the court made no finding on whether Defendants filed their motion to set aside the default judgment within a reasonable time. On remand, the trial court corrected that omission by filing the Amended Order, which provides, in relevant part:

FINDINGS OF FACT

* * *

> 28. In addition to his private practice, Mr. Owen also serves as an Administrative Law Judge. Mr. Owen's duties as an Administrative Law Judge require him to schedule literally hundreds of hearings, conferences and filings each month. Mr. Owen does not have a secretary and maintains his own schedule and calendars each of these items himself.
>
> * * *
>
> 30. On December 26, 2007, the Plaintiffs moved for Default Judgment on grounds that the Defendants had failed to file an answer. Citing Indiana Rule of Trial Procedure 5(A), the Plaintiffs did not provide any notice of their motion for default judgment to either BR Associates or Sidal.
>
> 31. Unaware of the pending motion for default judgment, Mr. Owen entered his appearance in this matter on December 27, 2007[,] and filed an Answer to the Plaintiffs' Complaint on December 28, 2007.
>
> 32. At the time Mr. Owen filed his Notice of Appearance and Answer, Plaintiffs' counsel studiously avoided mentioning the pending Motion for Default Judgment. Mr. Owen and his clients (BR Associates and Sidal) learned of the Default Judgment only belatedly, after it was entered by the Court on January 10, 2008[,] and mailed by the clerk to the Defendants themselves.
>
> 33. After belatedly learning of the entry of Default Judgment on Friday, January 16, 2008, Mr. Owen initially believed that a clerical error had occurred. Since Mr. Owen still believed, albeit mistakenly, that he had timely filed his Answer and felt certain that opposing counsel would, as a

matter of professional courtesy, have advised him of any pending default judgment, Mr. Owen's confusion is easily understandable.

34. After conducting a thorough investigation into the matter, however, Mr. Owen eventually learned of his calendaring error. Soon thereafter, he took it upon himself to research, draft and file an extensive Motion to Set Aside the Default Judgment. Under the circumstances of this unique factual case, based on the facts presented and the initial confusion surrounding the calendaring error, the Court finds that the time spent by Mr. Owen to investigate this matter and file the Motion to Set Aside Default Judgment was not unreasonable.

* * *

39. In addition to the Findings of Fact previously identified, this Court finds that the Defendants[] timely filed their Motion to Set Aside default and enforce Arbitration. The lapse of time between the entry of default, notice to Defendants and subsequent Motion to Set Aside Default and Enforce Arbitration was reasonable under the circumstances and complexity of [the] issue involved.

* * *

CONCLUSIONS OF LAW

* * *

2. The Defendants' Motion to Set Aside Default Judgment was filed within a "reasonable time."

Indiana Rule of Trial Procedure 60(B) provides, in pertinent part, that a motion for relief "shall be filed within a reasonable time for reasons (5), (6), (7) and (8), and no more than one year after judgment, order or proceeding was entered or taken for reasons (1), (2), (3) and (4)." The Defendants' Motion to Set Aside Default Judgment was filed on March 4, 2008[,] and was obviously filed well[]within the one[-]year period for seeking relief under reasons (1), (2), (3) and (4). Nevertheless, Plaintiffs contend that the Defendants' Motion to Set Aside was not filed within a "reasonable time" because the Defendants' attorney, Mr. Owen, learned of the Default Judgment on January 16, 2008 and filed the Motion to Set Aside Default Judgment on March 4, 2008. In essence, the Plaintiffs argue that this forty-seven[-]day[] gap between receiving news of the default judgment and filing to have it set aside was unreasonable.

> There is no set rule for determining what constitutes a reasonable time for seeking relief from a default judgment. Merkor v. McCuan, 728 N.E.2d 209, 212 (Ind. Ct. App. 2000). What is considered a "reasonable time" varies with the facts and circumstances of each case. Id. Under the circumstances of this case, Defendants' submission of the Motion to Set Aside on March 4, 2008 was reasonable.
>
> As set forth in the Findings of Fact, Defendants' counsel did not learn of the Default Judgment until Friday, January 16, 2008. At that time, based upon his belief that he had timely filed an Answer to the Plaintiffs' Complaint on December 28, 2007, Mr. Owen believed, albeit mistakenly, that the entry of default judgment was the result of a clerical error. Compounding this confusion was opposing counsel's calculated decision to avoid mentioning the pending Motion for Default Judgment.
>
> Under these circumstances, Mr. Owen's confusion regarding the entry of default judgment is not surprising. It is therefore perfectly understandable, and indeed appropriate, that Mr. Owen took sufficient time to investigate and verify the underlying basis of the default judgment before filing a motion to have it set aside. Given the complexity of the factual and legal issues involved in the Defendants' Motion to Set Aside the Default Judgment and the necessity of investigating these matters, the forty-seven day period for researching, briefing and filing the Defendants' Motion was not unreasonable. . . .

Amended Order at 6-9, 12-13. Given the detailed findings and conclusions thereon in the Amended Order, we conclude that the findings on whether Defendants filed the motion to set aside the default judgment within a reasonable time are adequate for appellate review.

Finally, Wright contends that the findings are inadequate as to whether Defendants asserted meritorious defenses. In the Order, the court found that "Defendants ha[d] made a prima facie case of meritorious defenses as set forth in the memorandum filed with [the trial] Court and the Court conclude[d] as a matter of law that it [was] required by the Federal Arbitration Act[,] 9 U.S.C. §§ 2 [and] 3[,] and the Indiana Arbitration Act, [Indiana Code Section] 34-57-2-3, to enforce the part[ies'] arbitration agreement and stay all further proceedings pending arbitration, and that just cause exists for vacating the

default judgment." Id. This finding clearly explains the basis for the court's order staying the proceedings and compelling arbitration. Again, with regard to this and the previous two findings, the court need not recite the evidence in detail, but must only make findings as to those ultimate facts necessary to support the judgment. Riehle, 601 N.E.2d at 369. Wright's claim that the findings are inadequate for appellate review is without merit.

Issue Two: Setting Aside the Default Judgment

Wright next contends that the trial court abused its discretion when it set aside the default judgment. Our supreme court has explained the standard for reviewing an order setting aside a default judgment as follows:

> Once entered, a default judgment may be set aside because of mistake, surprise, or excusable neglect so long as the motion to set aside the default is entered not more than one year after the judgment and the moving party also alleges a meritorious claim or defense. Ind. Trial Rule 55(C); 60(B). When deciding whether or not a default judgment may be set aside because of excusable neglect, the trial court must consider the unique factual background of each case because "no fixed rules or standards have been established as the circumstances of no two cases are alike." Though the trial court should do what is "just" in light of the facts of individual cases, that discretion should be exercised in light of the disfavor in which default judgments are held. . . . On appeal, a trial court's decision to set aside a default judgment is entitled to deference and is reviewed for abuse of discretion. Any doubt of the propriety of a default judgment should be resolved in favor of the defaulted party. Indiana law strongly prefers disposition of cases on their merits. A trial court will not be found to have abused its discretion "so long as there exists even slight evidence of excusable neglect."

Coslett v. Weddle Bros. Constr. Co., 798 N.E.2d 859, 860-61 (Ind. 2003) (some citations omitted).

As discussed above, the trial court here made special findings in its Order and Amended Order. When the trial court enters findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A), we utilize a two-tiered standard of review. Mounts v. Evansville Redevelopment Comm'n, 831 N.E.2d 784, 788-89 (Ind. Ct. App. 2005), trans. denied. First, we determine whether the evidence supports the trial court's findings, and then whether the findings support the judgment. Id. at 789. Special findings are adequate to support the judgment only if they disclose a valid basis for the legal result reached by the trial court. Id.

Excusable Neglect

Wright first contends that the trial court abused its discretion in finding that the mis-docketing of the due date for answering the Complaint by Owen, Defendants' former counsel, constituted excusable neglect under Trial Rule 60(B)(1). In support, Wright cites to Smith v. Johnston, 711 N.E.2d 1259 (Ind. 1999). In Smith, a summons arrived with the mail, and a scrub nurse placed the mail on a physician's desk. The medical group's office manager, who normally handled all legal matters, was in the process of leaving the group and was absent from the office. But the physician did not read the mail until after default judgment had been entered. Although aware that the person normally in charge of legal matters was not in the office, the physician had not read his mail in a timely fashion. The court found such to be an example of neglect but not excusable neglect warranting relief from default judgment under Trial Rule 60(B)(1). Smith, 711 N.E.2d at 1262.

Smith is inapposite to the present case. There, a physician was aware that the person who normally handled legal matters was no longer doing so, yet the physician failed to review his mail for legal matters. Here, Defendants were aware of the suit and took action by hiring Owen as counsel to represent them. Owen then mis-docketed the date the answer was due by confusing one of Defendants' cases with another. The belated filing of the answer was not the result of Defendants' failure to act but, instead, was the consequence of their former attorney's simple mistake. Thus, Smith does not compel reversal of the trial court's order in this case.

Wright also cites to Rose v. Rose, 390 N.E.2d 1056 (Ind. Ct. App. 1979), and Moe v. Koe, 330 N.E.2d 761 (Ind. Ct. App. 1975), in support of their argument that Owen's conduct, while neglectful, does not rise to the level of excusable neglect. But Wright does not explain how Rose or Moe apply to the facts of the present case. Thus, they have waived the argument for review. See Ind. Appellate Rule 46(A)(8)(a) ("The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. . . .").

Waiver notwithstanding, we address the merits of Wright's contention. Citing to Rose and Moe, Wright asserts that "Indiana law holds a defaulted party responsible for its attorney's neglect." Appellant's Brief at 18. While that is true as a general rule, Wright omitted that "the general rule is tempered by [Kreczmer v. Allied Construction Co., 152 Ind. App. 665, 284 N.E.2d 869, (1972),] wherein we held that the facts and circumstances of the particular case are controlling." Rose, 390 N.E.2d at 100. Thus, in Rose, this court held that a default judgment against a husband in dissolution proceedings should have

been set aside where the "uncontradicated [sic] evidence disclose[d] that the client exercised diligence but whose rights were forfeited by attorney misconduct, the latter's negligence should not be imputed to the client." Id. at 101. Additionally, Wright's citation to Moe in support of the general rule is curious, given that, in Moe, the court held that relief from a default judgment may be proper where the negligence of the client's attorney is shown to be excusable. Moe, 284 N.E.2d at 104.

Here, the trial court found that "excusable neglect exi[s]ts based upon the testimony of Attorney Owen regarding the mis-docketing of dates[.]" Appellant's App. at 11. In Defendants' motion to set aside the default judgment, Owen averred that he had met with Defendants' representatives on November 27, 2007, to discuss three lawsuits involving Defendants, including Plaintiffs' suit. Owen further stated that, at the conclusion of the meeting he had returned to his office to calendar the due dates for filing an answer in each case, but he had "mistakenly switched the service and due dates of two of the lawsuits, including this suit." Appellant's App. at 62. As a result of the mis-docketing, the due date that Owen calendared for filing an answer to Plaintiffs' Complaint was after the actual due date. On the facts and circumstances of this case, we conclude that the trial court did not abuse its discretion in finding that Owen's mis-docketing of the due date for Defendants' answer constituted excusable neglect.

Reasonable Time

Wright next contends that the trial court abused its discretion when it granted the motion to set aside the default judgment because that motion was not filed within a "reasonable time." The determination of what constitutes a reasonable time varies with

the circumstances of each case. Levin v. Levin, 645 N.E.2d 601, 604 (Ind. 1994). Relevant to the question of timeliness is prejudice to the party opposing the motion and the basis for the moving party's delay. Id.

Wright argues that Defendants offered "no excuse or explanation for the delay (January to March) in filing this motion to set aside[.]" Appellant's Brief at 19. To the contrary, at the hearing on the motion to vacate the default judgment, Defendants argued that they had filed their motion within a reasonable time. Specifically, Owen noted that the case, an "opt[-]in collective action," was complex and, therefore, he had needed time to gather "voluminous" personnel files as well as review the law on Trial Rule 60(B).[7] Transcript at 16. The trial court agreed with Defendants, finding in the Amended Order that the forty-seven-day delay between the default judgment and the filing of the motion to set aside and supporting brief was not unreasonable in light of: (1) Owen's initial but mistaken belief that the default judgment was the result of a clerical error; (2) Plaintiffs' counsel's "calculated decision to avoid mentioning the pending Motion for Default Judgment" to Owen, Amended Order at 13; (3) the "complexity of the factual and legal issues involved" in the motion, id.; and (4) the "necessity of investigating" the factual and legal matters, id. We agree with the trial court.

Wright also states that Defendants' motion was not filed within a reasonable time because the delay "prevented other similarly situated salaried managers from receiving notice of the FLSA collective action." Appellant's Brief at 20. But Wright makes no

[7] We observe that Wright included a complete copy of the transcript in her two-volume appendix. This practice not only violates Indiana Appellate Rule 50(A)(g), which instructs appellants to include "brief portions of the Transcript . . . that are important to a consideration of the issues raised on appeal," but also results in an unwieldy file. (Emphasis added.) We urge Wright's counsel to abide by this important rule in the future.

independent argument in support of that contention. Instead she merely refers us to her argument before the trial court as provided in the transcript. Wright also argues, without explanation, that the delay resulted in "potential statute of limitation problems other potential collective action plaintiffs would face if the Default Judgment were set aside." Id. Wright's arguments on this point do not satisfy Appellate Rule 46(A)(8)(a). ("The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning."). Thus, she has waived the argument for review.

Meritorious Defense

Finally, Wright contends that Defendants' motion to set aside the default judgment should have been denied because Defendants failed to assert any meritorious defenses. Relief under Trial Rule 60(B) requires a prima facie showing of a "meritorious claim or defense." T.R. 60(B). One way to meet this requirement is to identify evidence that, if credited, demonstrates that a different result would be reached if the case were retried on the merits. Outback Steakhouse of Fla., Inc. v. Markley, 856 N.E.2d 65, 81 (Ind. 2006) (citation omitted). A prima facie showing is one that "will prevail until contradicted and overcome by other evidence." BLACK'S LAW DICTIONARY 1189 (6th ed. 1990). An affidavit that provides only slight evidentiary support for a claim of a meritorious defense has been held sufficient to establish a prima facie showing.[8] Smith, 711 N.E.2d at 1265 (citation omitted).

[8] Wright goes to great lengths to argue the merits of her claims without addressing separately whether Defendants made a prima facie showing of a meritorious defense under Trial Rule 60(B). The merits of Wright's claims are not at issue when determining whether relief from judgment is warranted under Trial Rule 60(B). Instead, we consider only whether Defendants' asserted defenses, if credited on their face, would absolve them of liability on the Complaint. Markley, 856 N.E.2d at 81. However, we

Here, Sidal offers the absolute defense that it was not Wright's employer and, as a result, is not a proper party to the complaint. That assertion, if uncontradicted, states a complete defense to the claims in the complaint. Therefore, the trial court did not abuse its discretion in finding that Sidal had stated a meritorious claim to support setting aside the default judgment as to Sidal.

BR asserts as a defense that Wright is contractually bound to arbitrate her disputes with BR. No reported Indiana cases have specifically held that an agreement to arbitrate, as distinct from a completed arbitration and award, may be asserted as prima facie evidence of a meritorious defense in the context of setting aside a default judgment. But, as noted above, when determining whether a party has raised a meritorious defense under Trial Rule 60(B), we consider whether the claim or defense raised, if credited, would bar the Wright's claims. See Markley, 856 N.E.2d at 81. Thus, solely for the purpose of determining whether BR has asserted a meritorious defense,[9] we credit the claim that there is an enforceable agreement to arbitrate and that Wright's disputes fall within that agreement. See id. As such, we hold that an agreement to arbitrate is prima facie evidence of a meritorious defense when a party seeks to vacate a default judgment.

Issue Three: Motion for Stay and to Compel Arbitration

Wright contends that the trial court erred when it granted Defendants' motion to stay the proceedings and to compel arbitration. Specifically, Wright argues that: (1) Defendants waived the right to compel arbitration; (2) Defendants did not show the

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will address the merits of the Defendants' defense, that Wright had agreed to arbitrate her disputes, in Issue Three when we consider whether the trial court erred in ordering arbitration.

[9] Again, we address the merits of the defense, that the Wright's disputes are subject to binding arbitration agreements, in Issue Three.

existence of an enforceable agreement to arbitrate; and (3) the trial court abused its discretion by ruling on the motion to stay and to compel arbitration before the deadline set for Wright's response to that motion and before the hearing set for that motion. We address each contention in turn.

Waiver of Right to Arbitrate

Wright contends that Defendants waived their right to compel arbitration under the arbitration agreements. Arbitration is a matter of contract, and a party cannot be required to submit to arbitration unless it has agreed to do so. Mid-America Surgery Ctr. v. Schooler, 719 N.E.2d 1267, 1269 (Ind. Ct. App. 1999). "Although a written agreement to submit a dispute to arbitration is valid and enforceable, the right to require such arbitration may be waived by the parties." Safety Nat'l Cas. Co. v. Cinergy Corp., 829 N.E.2d 986, 1004 (Ind. Ct. App. 2005) (quoting Shahan v. Brinegar, 181 Ind. App. 39, 390 N.E.2d 1036, 1041 (Ind. Ct. App. 1979)). Such a waiver need not be in express terms and may be implied by the acts, omissions or conduct of the parties. Id.

Whether a party has waived the right to arbitration depends primarily upon whether that party has acted inconsistently with its right to arbitrate. Id. Waiver is a question of fact under the circumstances of each case. Id.

> In determining if waiver has occurred, courts look at a variety of factors, including the timing of the arbitration request, if dispositive motions have been filed, and/or if a litigant is unfairly manipulating the judicial system by attempting to obtain a second bite at the apple due to an unfavorable ruling in another forum.

Id. (quoting Finlay Props., Inc. v. Hoosier Contracting, LLC, 802 N.E.2d 453, 455 (Ind. Ct. App. 2003)).

Wright maintains that Defendants waived their right to arbitration when they:

> 1. Filed two dispositive motions on March 4, 2008 (Appellant's [sic] App., pp. 3-4);
>
> 2. Filed a Motion to Set Aside Default Judgment with supporting Memorandum and Affidavits from [Defendants'] witnesses on March 4, 2008 (Appellant's [sic] App., pp. 61-165); and
>
> 3. Presented the testimony of Ms. Jane Merder to the Court on May 5, 2008, describing the purported "merits" of Defendants' positions in this case (Appellant's [sic] App., pp. 281-286).

Appellant's Brief at 33. We disagree.

Wright does not specify in their brief what "dispositive motions" Defendants filed on March 4, 2008. A review of the Chronological Case Summary shows that Defendants filed the motion to set aside the default judgment and a motion for summary judgment on that date. Wright also failed to explain how the filing of either motion was inconsistent with Defendants' right to request arbitration, nor has she provided a copy of the motion for summary judgment for our review in that regard. Thus, we cannot say that Defendants' filing of the motion for summary judgment was inconsistent with their right to request arbitration.

With respect to the motion to vacate the default judgment, we observe that, at the time of filing, the case was proceeding in the damages phase and Plaintiffs were seeking certification of the complaint as a class action and a collective action. The filing of Defendants' motion to set aside the default judgment was necessary to protect Defendants' rights. See Finlay Props., Inc., 802 N.E.2d at 456 (holding, in part, that insurer's filing of complaint was necessary to protect its substantive rights and not

inconsistent with its right to compel arbitration). Thus, the filing of the motion to vacate the default judgment was not inconsistent with Defendants' right to request arbitration.

Finally, Wright argues that the testimony of Jane Merder at the May 5, 2008, hearing is "indicative of waiver." Appellant's Brief at 33. But the cited portion of Merder's testimony, offered at the hearing on Defendants' motion to vacate the default judgment, was not offered by Defendants. Rather, that testimony by Merder was elicited on cross-examination by Plaintiffs' counsel regarding Defendants' claim of a meritorious defense, a necessary element for relief under Trial Rule 60(B). Moreover, the cited testimony regards Defendants' wage policies. Wright does not explain how testimony that she elicited regarding Defendants' respective wage policies constitutes waiver of the right to request arbitration. Merder's testimony does not support Wright's waiver argument.

Also in support of her argument, Wright cites to Tamko Roofing Products, Inc. v. Dilloway, 865 N.E.2d 1074 (Ind. Ct. App. 2007). There, the defendant waited until the close of the plaintiff's case at trial before invoking its right to arbitration for the first time. On appeal, the court held that the defendant's "timing of an arbitration request was belated[,]" and, therefore, the trial court had properly determined that the defendant had waived its right to arbitration. Id. at 1080.

Here, the parties have not yet proceeded to trial. As explained above, Wright has not demonstrated that Defendants' filing of the motion to vacate the default judgment or a motion for summary judgment on unknown issues is inconsistent with Defendants' right to request arbitration. Merder's testimony at the May 5 hearing also does not support

Defendants' argument. And Defendants filed their motion invoking their right to arbitration before the start of the hearing on the motion to vacate default judgment. Thus, Wright's argument that Defendants waived their right to request arbitration must fail.

Enforceable Arbitration Agreement

Wright next contends that, due to lack of an enforceable agreement to arbitrate, the trial court erred when it granted Defendants' motion to compel arbitration. Appellate courts apply a de novo standard of review to a trial court's determination regarding a motion to compel arbitration. State ex rel. Carter v. Phillip Morris Tobacco Co., 879 N.E.2d 1212, 1214-15 (Ind. Ct. App. 2008), trans. denied. Where a court is asked to compel or stay arbitration, it faces the threshold question of whether the parties have agreed to arbitrate the particular dispute. Mid-America Surgery Ctr., 719 N.E.2d at 1269. Before a court compels arbitration, it must resolve any claims the parties had concerning the validity of the contract containing the arbitration clause. Id. Once satisfied that the parties contracted to submit their disputes to arbitration, however, the court is required by statute to compel arbitration. Id.

In determining whether a valid contract to arbitrate exists, our standard of review in this case is de novo. See Showboat Marina Casino P'ship v. Tonn & Blank Constr., 790 N.E.2d 595, 597 (Ind. Ct. App. 2003). The court should attempt to determine the intent of the parties at the time the contract was made by examining the language used to express their rights and duties. Id. Words used in a contract are to be given their usual and common meaning unless, from the contract and the subject matter thereof, it is clear that some other meaning was intended. Id. Words, phrases, sentences, paragraphs, and

sections of a contract cannot be read alone. Id. The entire contract must be read together and given meaning, if possible. Id. Further, "when construing arbitration agreements, every doubt is to be resolved in favor of arbitration," and the "parties are bound to arbitrate all matters, not explicitly excluded, that reasonably fit within the language used." Sanford v. Castleton Health Care Ctr., L.L.C., 813 N.E.2d 411, 416 (Ind. Ct. App. 2004).

Wright contends that Defendants do not have an enforceable arbitration agreement with her. Specifically, she points out that, as proof of an arbitration agreement, Defendants supplied a page containing Wright's signature in Exhibit B to Defendants' Motion to Stay Proceedings Pending Arbitration. But that page does not include any part of an arbitration agreement, and that page, "on its face, is plainly not part of the first 12 pages of 'Exhibit B' (Appellant's [sic] App., pp. 328-339) which were not even created until May 2004, more than one year after the date next to Ms. Wright's signature." Appellant's Brief at 35.

Wright argues that because her signature page does not match, by date or page number sequence, the document entitled Dispute Resolution Program provided by Defendants, that Defendants have not proved the existence of a binding agreement to arbitrate claims with Wright. Defendants counter that Wright's signature on the Dispute Resolution Program document was not required in order for the agreement to arbitrate disputes to be binding. We agree with Defendants.

In TWH, Inc. v. Binford, 2008 Ind. App. LEXIS 2615 (2008), trans. pending, Binford bought a used car for her son. Binford alone executed a purchase agreement, but

both Binford and her son executed a retail installment contract. Only the purchase agreement contained an arbitration clause. When a dispute regarding the purchase arose, the seller requested the court to order arbitration. The trial court denied the seller's request, but on appeal this court reversed. We observed that the son had admitted that he was a co-purchaser of the car and that such statement "constitute[d] a judicial admission and [bound the son] to the arbitration provision in the purchase agreement." Id. at *4-*5. Thus, a signature was not required for there to be a binding agreement to arbitrate disputes. See id.

Here, Wright has consistently admitted that she was employed by BR. Indeed, her claims in the Complaint depend on that relationship. Upon her employment, she signed a document acknowledging receipt of an Employee Information Guide and the Dispute Resolution Program contained in that Guide. Wright does not deny that she signed a document to acknowledge receipt of the Dispute Resolution Program document. Nor does she contest that the Dispute Resolution Program document includes a clause requiring arbitration of employment-related disputes. But she argues that Defendants have not demonstrated that her signature on the receipt binds her to the arbitration provision in the Dispute Resolution Program document. Neither Indiana statute nor case law requires an employee to sign an arbitration agreement in order to be bound by the same. See Ind. Code § 34-57-2 ("A written agreement to submit to arbitration is valid, and enforceable . . . .") (emphasis added); TWH, 2008 Ind. App. LEXIS 2615 at *4-*5 (admitted co-purchaser was bound by arbitration provision in purchase agreement even though he did not sign purchase agreement). We hold that Wright, by virtue of her

employment and her acknowledgement of receipt of the Dispute Resolution Program document, is bound by the terms of the arbitration provision in the Dispute Resolution Program.

Ruling Before Deadline for Response

Finally, Wright contends that the trial court abused its discretion by ruling on the motion to stay and to compel arbitration before the deadline set for Plaintiffs' response to that motion and before the hearing set for that motion. In support, Wright cites to Vigo County Local Rule LR84-TR7 Rule 4(D), which addresses motion practice and provides, in part: "If the opposing party desires to file a brief or memorandum, that party must do so within thirty (30) days of service of the movant's brief or memorandum." But that local rule does not mandate an opportunity to file a brief or memorandum in opposition to a motion. Instead, the rule merely sets a time limit for a party to exercise that option. Wright has not shown that the trial court abused its discretion by ruling on the motion to compel arbitration, before the deadline for Plaintiffs to file a brief or memorandum in opposition.

Wright also alleges that she was "certainly prejudiced by the trial court's ruling without first learning Plaintiffs' position" on the motion to compel arbitration. Appellant's Brief at 30. But Wright does not explain how she were prejudiced by the timing of the court's order compelling arbitration. While we do not approve of trial courts instructing parties of a filing deadline and then issuing an order before that deadline has passed, here, Wright was not prejudiced by the trial court's action. As we

have determined, Wright's arguments in opposition to the motion to compel arbitration are either waived or without merit. As such, the court's error, if any, was harmless.

Conclusion

We conclude that the trial court's findings and conclusions thereon are adequate for appellate review. The trial court found that Defendants' former counsel's mis-docketing of the due date for the answer constituted excusable neglect where he transposed the due dates for two of Defendants' cases. The court also found that Defendants filed their motion to set aside the default judgment within a reasonable time, given the "understandable" confusion surrounding the entry of default judgment and the complexity of the case; and that Defendants had made a prima facie case of meritorious defenses. Those findings are sufficient to support a valid legal basis for the trial court's decision and, therefore, are adequate for appellate review.

We further conclude that the trial court did not abuse its discretion when it set aside the default judgment. We agree with the trial court's conclusion that, on the facts of this case, Defendants' former attorney's mis-docketing of the due date for answering the complaint constituted excusable neglect. We also agree with the conclusion that the forty-seven-day delay between learning of the default judgment and filing a motion to set aside that judgment was reasonable, given the circumstances surrounding the entry of default and the complexity of the individual, collective, and class action claims asserted in the Complaint. And we agree that Defendants each asserted meritorious defenses. First, Sidal's contention that it never employed Wright is, on its face, a complete defense

to the claims asserted. And BR's argument that Wright is contractually bound to arbitrate her employment disputes also states a defense to the claims raised in the Complaint.

Finally, we conclude that the trial court did not abuse its discretion when it stayed the proceedings and ordered arbitration. Wright has not shown that Defendants waived their right to request arbitration of Wright's claims. The arbitration agreement contained in the Dispute Resolution Program is binding on Wright in that she signed a document acknowledging receipt of the arbitration agreement. Her signature on the arbitration agreement itself was not required. And Wright did not demonstrate any prejudice arising from the trial court's ruling before the deadline for filing Plaintiffs' opposition to the motion to compel arbitration. As such, the trial court properly granted Defendants' motion to compel arbitration.

Affirmed.

BAKER, C.J., and KIRSCH, J., concur.